

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6159 OF 2018

Kedar Rameshchandra Gavankar	...	Petitioner
Vs.		
Rajesh L. Shah and another	...	Respondents

Ms Anjali Helekar for Petitioner.
Mr. Vijay V. Nene for Respondents.

CORAM : R. G. KETKAR, J.
DATE : JUNE 14, 2018

P.C. :

Heard Ms Helekar, learned Counsel for the petitioner and Mr. Nene, learned Counsel for the respondents at length.

2. By this Petition under Article 227 of the Constitution of India, petitioner has challenged the - (i) judgment and order dated 25.09.2017 (for short 'first order'); (ii) judgment and order dated 25.09.2017 (for short 'second order'), both, passed by the Competent Authority (Rent Act), Konkan Division, Mumbai (for short 'Competent Authority') and (iii) judgment and order dated 09.05.2018 passed by the Additional Commissioner, Konkan Division, Mumbai (for short 'Commissioner') in Revision Application No.1016 of 2017. By the first order, the Competent Authority rejected the application for leave to defend made by the petitioner. By the second order, the Competent Authority allowed the application being Case No.56 of 2010 filed by the respondents under Section 24 of the Maharashtra Rent Control Act, 1999 (for short 'Act') and directed the petitioner herein to handover vacant and peaceful possession of flat No.4, 2nd floor, Govind Smruti, Ashok Chakraborty Road, Kandivali (East), Mumbai 400 101 (for short 'suit premises'). The Competent Authority further directed the petitioner to pay double the

rate of licence fees @ Rs.10,000/- (5000 x 2) per month from the date of expiry of leave and licence agreement i.e. 05.08.2010 till vacant possession of the suit premises is delivered to the respondents. By order dated 09.05.2018, the Commissioner rejected the Revision Application preferred by the petitioner herein.

3. In support of this Petition, Ms Helekar reiterated the contentions raised by the petitioner in application for leave to defend as also the contentions raised while defending the proceedings filed by the respondents under Section 24 of the Act. She submitted that there is no privity of contract between the petitioner and the respondents. She submitted that respondents allegedly entered into leave and licence agreement with Rameshchandra Govind Gavankar (hereinafter referred to as '**Rameshchandra**') on 28.07.2010. **Rameshchandra** was not mentally fit and the alleged agreement was executed by **Rameshchandra** during the period when he was not mentally fit and was of unsound mind. The said agreement is void ab initio. Petitioner has produced certificates before the Competent Authority and by order dated 19.09.2011, the Competent Authority appointed Kedar Rameshchandra Gavankar (hereinafter referred to as '**Kedar**') as a guardian of **Rameshchandra**. Respondents have not challenged the said order till date. She further submitted that respondents are not owners of the suit premises. They have not produced any document to establish their ownership. In fact, the suit property was developed by Govind and Company, a partnership firm. Wife of **Rameshchandra** is a partner of the said firm. The said firm had not sold the suit property to the respondents. The respondents have instituted the proceedings under Section 24 of the Act by taking undue advantage of the mental condition of **Rameshchandra**. **Rameshchandra** is incapable of executing any agreement.

4. She further submitted that the leave and licence agreement is even otherwise unconscionable. She invited my attention to the following recitals and clause 17 of that agreement.

“AND WHEREAS the Licensee being in need approached the Licensors with a request to allow him to use the said flat for this residential purpose only, on Leave and Licence basis for a period of 04 months commencing from 05/04/2010 to 04/08/2010. The Adjoining flat No.3 is duly occupied by the Licensee and his family members and hence Licensee has requested the Licensor to allow him to demolish the dividing wall between flat No.3 and flat No.4.

17. It is hereby agreed between the parties hereto that at all times the juridical possession of the said Flat shall be of the Licensors only and the Licensee shall have only the right to use and occupy the said Flat. The Licensors shall keep duplicate key of the said Flat for the purpose of convenience to the Licensee.”

5. Relying upon the above recitals, she submitted that though the period of leave and licence agreement was 4 months, the respondent permitted the petitioner to demolish the dividing wall between flat No.3 (which is in possession of **Rameshchandra**) and flat No.4, which is the suit premises. As per clause 17, respondents were to keep the duplicate key of the suit premises for the purpose of convenience of **Rameshchandra**. She submitted that perusal of leave and licence agreement will clearly show that no person of sound mind will ever enter into this type of leave and licence agreement. She submitted that as the leave and licence agreement was entered by the respondents with a person of unsound mind, the said agreement is void and is not enforceable. Lastly, she submitted that the petitioner was not given a reasonable and fair opportunity to defend the proceedings. In support of her submissions, she relied upon the following decisions:

- a. ***Somnath Dnyanoba Mahapure Vs. Tipanna Ramchandra Jannu***, AIR 1973 Bom 276; and

b. ***Vijesh Vs. Jacob Verghese, 2016 (3) Mh.L.J. 432.***

6. On the other hand, Mr. Nene supported the impugned orders. He submitted that the leave and licence agreement is a registered instrument. The agreement executed by the parties is witnessed by - (i) Pushpa Mitalesh Thakur and (ii) Nilima Dhanaji Pawar. The petitioner has not filed affidavit of any of these witnesses to the agreement to substantiate that at the time of execution of the leave and licence agreement on 28.07.2010, **Rameshchandra** was a person of unsound mind. He further submitted that the presumption under Section 114(e) of the Indian Evidence Act, 1872 (for short 'Evidence Act') is squarely applicable in the facts and circumstances of the present case. The Court has to presume that the official acts have been regularly performed. He submitted that neither **Rameshchandra** nor **Kedar** has filed any proceedings for cancellation of the registered instrument. He submitted that the Authorities below have considered the material on record and the fact that the registered leave and licence agreement has expired and accordingly have passed the impugned orders and directed the petitioner and **Rameshchandra** to handover vacant and peaceful possession of the suit premises. Mr. Nene contended that **Rameshchandra** had sold the suit premises to the respondents by executing the registered sale deed on 03.04.2010 and hence, respondents are the owners of the suit premises. He, therefore, submitted that no case is made out for interfering with the impugned orders.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that registered leave and licence agreement was entered into by and between respondents on one hand and **Rameshchandra** on the other. It is also not in dispute that as of date, **Rameshchandra** or for that matter **Kedar** has not initiated any

proceedings for cancellation of the registered instrument in terms of Section 31 of the Specific Relief Act, 1963 (for short 'S.R.Act'). Thus, as on date, one has to proceed on the footing that the leave and licence agreement exists between the parties. Explanation (b) to Section 24 of the Act reads thus,

“24 (1) to (3) ...

Explanation.-

(a) ...

(b) an agreement of licence in writing shall be conclusive evidence of the fact stated therein.”

8. A perusal of the above provision clearly shows that an agreement of licence in writing is conclusive evidence of the facts stated therein. A perusal of the recitals in the leave and licence agreement shows that respondents No.1 and 2 claim that they are absolutely seized and possessed of the suit premises. **Rameshchandra** being in need of the suit premises approached them with a request to allow him to use the suit premises for a period of 4 months commencing from 05.04.2010 to 04.08.2010. It is not in dispute that the adjoining flat No.3 is occupied by the licensee, namely **Rameshchandra** and his family members and it is in that context, **Rameshchandra** requested the respondents to allow him to demolish the dividing wall between flats No.3 and 4. The next recital is to the following effect:

“AND WHEREAS the Licensors have agreed to comply with the request of the Licensee and allowed Licensee to break dividing wall between flat No.3 and flat No.4 strictly on the condition that the same shall be constructed by the Licensee at his cost on expiry of the License.”

9. A perusal of the above recital clearly shows that respondents agreed to permit **Rameshchandra** to demolish the dividing wall

between flats No.3 and 4 strictly on the condition that **Rameshchandra** will construct the wall at his cost on the expiry of licence. I, therefore, do not find anything wrong in the recitals of the agreement.

10. Ms Helekar relied upon clause 17 of that agreement. Relying upon the recital and clause 17 of the leave and licence agreement, she submitted that the agreement is unconscionable. I have already extracted clause 17 of the agreement. That clause permitted respondents to keep duplicate key of the suit premises for the purpose of convenience of **Rameshchandra**. I do not find anything unconscionable in the said clause. In view thereof, I do not find any merit in the submission of Ms Helekar that the agreement is unconscionable and no person of sound mind will ever enter into this type of leave and licence agreement.

11. Ms Helekar relied upon the order dated 19.09.2011 passed by the Competent Authority thereby appointing **Kedar** as guardian of **Rameshchandra**. A perusal of that order shows that the Competent Authority had referred to certificate dated 09.03.2011 issued by J.J. Hospital as also considered the record of treatment of **Rameshchandra** since the year 2000 produced on record and observed that, “applicant has filed reply denying the application. According to the applicant Mr. Kedar Gavankar has deliberately filed the present application with ulterior motive of defeating the applicant's claim but prima facie, the certificate regarding mental illness issued by the public authority will have to be presumed to be true unless contrary is proved. It is needless to state that decree against person of unsound mind is nullity. Even if we proceed further in the matter without appointing guardian then the order will be unexecutable on these grounds. So it will be just and proper to allow the application.” It is no doubt true that respondents did not challenge that order.

12. While rejecting the application for leave to defend, the Competent Authority has considered - (i) certificate dated 23.09.2000 of Sir J.J. Group of Hospitals, Mumbai certifying that **Rameshchandra** is a patient of chronic major depression, (ii) certificate dated 08.02.2000 certifying that **Rameshchandra** was sent home on 03.12.1999 after treatment for chronic major depression, (iii) discharge card of Sir J.J. Group of Hospitals showing his admission during the period from 01.11.2010 to 22.12.2010, and (iv) certificate dated 09.03.2011 of Dr. Y. A. Matcheswala stating that **Rameshchandra** was admitted on 01.11.2010 and discharged on 09.03.2011 and his diagnosis is psychotic depression. The Competent authority observed that in the entire proceedings, the certificates have not been proved by producing any of the Doctors before the Authority though opportunity for the same was given. No certificate certifying **Rameshchandra** being mentally ill person as defined under Section 2(l) of the Mental Health Act, 1987 (for short "M.H.Act") was produced on record. The certificates produced on record are also not the certificates under Sections 20 and 21 of the M.H.Act, and therefore, no presumptive value can be attached to any of these certificates. The contentions of the petitioner cannot be taken at the face value of it as **Rameshchandra** was never produced before the Hon'ble Magistrate, competent to direct medical examination of any such person under the provisions of the M.H.Act. **Kedar** had every opportunity to produce cogent evidence by production of the competent person, who may have examined **Rameshchandra** to ascertain and certify his mental condition. No application for grant of summons to any such expert witness was filed on behalf of **Rameshchandra**. There is no provision in the Evidence Act about presumption of any such certificate and therefore, the document i.e. the certificate itself could not raise any presumption that **Rameshchandra** was of unsound mind and incapable of entering into contract, either under the Indian Contract Act,

1872 (for short 'Contract Act') or the Act. It is admitted position in law that mental health of a person is a question of fact and must be decided by cogent evidence with opportunity to the other side to dispute such contentions. Mere claim, without any such evidence, cannot decide mental health condition of any person. The Authority had granted permission to **Kedar** to represent **Rameshchandra** on the plea that **Rameshchandra** was reported to be of unsound mind. Though the matter was carried before the different fora, there is no finding by any judicial authority in that behalf. Mere permission to **Kedar** to represent his father **Rameshchandra** cannot by itself establish anything, including the claim that **Rameshchandra** was of unsound mind, of which fact there is no admissible evidence on record. Thus, in the absence of admissible evidence, the Competent Authority could not hold that **Rameshchandra** was of unsound mind so as to render the registered leave and licence agreement voidable at the instance of **Kedar**. The onus and burden of proof in that behalf was not discharged and no fault could be found with the registered leave and licence agreement, which was to be given effect to. In paragraph 8, the Competent Authority noted that registered leave and licence agreement was executed on 28.07.2010 for a period of four months from 05.04.2010 to 04.08.2010. In view thereof, I do not find that the Competent Authority committed any error while rejecting the application for leave to defend by passing first order on 25.09.2017.

13. In so far as the second order dated 25.09.2017 in Case No.56 of 2010 is concerned, the Competent Authority observed in paragraph 15 that at no point of time, any complaint of any misrepresentation, fraud, coercion or such alike nature has come forth from the side of **Rameshchandra**. There is no evidence to show that **Rameshchandra** was of unsound mind on the relevant date i.e. 28.07.2010, which is the

date of execution of the leave and licence agreement. For the reasons recorded in paragraph 15, I do not find that the Competent Authority committed any error while passing the second order dated 25.09.2017 allowing Case No.56 of 2010 filed by respondents under Section 24 of the Act.

14. The Commissioner has rejected the Revision Application. A perusal of findings and decision recorded in paragraph 2 thereof shows that the Commissioner observed that the leave and licence agreement shows that **Rameshchandra** was in sound mental condition at the time of execution of the said agreement. The registered agreement creates doubt about mental illness of **Rameshchandra**. In paragraph 3, the Commissioner observed that **Kedar** produced certificates on record but did not produce **Rameshchandra** before the Competent Authority or before the Magistrate. No application for examination of the doctors who issued those certificates was made by **Kedar**. **Kedar** failed to establish certificates as per the parameters and provisions enshrined in M.H.Act. In paragraph 4, the Commissioner recorded that **Kedar** himself admitted that leave and licence agreement was executed between **Rameshchandra** and respondents and in the next sentence contended that respondents are not the owners. After perusing the order passed by the Commissioner, I do not find that the Commissioner has committed any error in passing the impugned order.

15. Ms Helekar submitted that **Rameshchandra** was of unsound mind at the time of execution of the alleged leave and licence agreement on 20.07.2010, and therefore, the said leave and licence agreement is void. As noted earlier, till date, **Rameshchandra** has not initiated any proceedings for cancellation of registered leave and licence agreement. Sub-section (1) of Section 31 of the S.R.Act lays down that any person

against whom a written instrument is void or voidable, and who has reasonable apprehension that such instrument, if left outstanding may cause him serious injury, may sue to have it adjudged void or voidable; and the Court may, in its discretion, so adjudge it and order it to be delivered up and cancelled. Sub-section (2) thereof lays down that if the instrument has been registered under the Indian Registration Act, 1908 (16 of 1908), the Court shall also send a copy of its decree to the officer in whose office the instrument has been so registered; and such officer shall note on the copy of the instrument contained in his books the fact of its cancellation. Neither **Rameshchandra** nor **Kedar**, till date, has adopted any proceedings for cancellation of the registered instrument. At least after institution of the proceedings under Section 24 of the Act by the respondents, **Rameshchandra** or **Kedar** should have initiated proceedings for cancellation of the registered instrument. Till date, no proceeding is adopted. Petitioner has not produced any material on record to indicate that any such proceedings are initiated for cancellation of the registered leave and licence agreement.

16. Ms Helekar submitted that **Rameshchandra** was a person of unsound mind even at the time when leave and licence agreement was executed on 28.07.2010. Even today, he is a person of unsound mind. For the time being, I presume that Rameshchandra is a person of unsound mind and therefore, incapable of entering into contract. I also proceed on the footing that though the agreement is not cancelled as on date, the same is void. In order to appreciate these submissions, it is necessary to consider the provisions of Contract Act, S.R.Act, Evidence Act and M.H.Act. Section 11 of the Contract Act lays down that every person is competent to contract who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject. Section

12 lays down that a person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind. A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

17. A perusal of leave and licence agreement shows that it is witnessed by (i) Pushpa Pawar and (ii) Neelima Pawar. **Kedar** has not filed affidavit of any of the witnesses to substantiate his plea that at the time of execution of the leave and licence agreement, **Rameshchandra** was of unsound mind. That apart, the instrument is registered before the Sub-Registrar. Clause (e) of Section 114 of the Evidence Act lays down that the Court may presume existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. The Court may presume that official acts have been regularly performed.

18. Section 64 of the Contract Act lays down that when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received. Section 65 lays down that when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. Section 68 lays down that if a person, incapable of entering into a

contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. Section 70 lays down that where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

19. Chapter V of the S.R.Act deals with cancellation of instruments. I have already dealt with Section 31 earlier. Section 33 reads thus,

“33. Power to require benefit to be restored or compensation to be made when instrument is cancelled or is successfully resisted as being void or voidable.- (1) On adjudging the cancellation of an instrument, the court may require the party to whom such relief is granted, to restore, so far as may be any benefit which he may have received from the other party and to make any compensation to him which justice may require.

(2) Where a defendant successfully resists any suit on the ground-

(a) that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it;

(b) that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Indian Contract Act, 1872 (9 of 1872), the court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited thereby.”

20. A perusal of the above extracted portion shows that on adjudging the cancellation of an instrument, the Court may require the party to whom such relief is granted to restore so far as may be any benefit which he may have received from the other party and to make any

compensation to him which justice may require. Sub-section (2)(a) thereof lays down that where a defendant successfully resists any suit on the ground that the instrument sought to be enforced against him in the suit is voidable, the court may if the defendant has received any benefit under the instrument from the other party, require him to restore, so far as may be, such benefit to that party or to make compensation for it. Clause (b) thereof lays down that the agreement sought to be enforced against him in the suit is void by reason of his not having been competent to contract under section 11 of the Contract Act, the Court may, if the defendant has received any benefit under the agreement from the other party, require him to restore, so far as may be, such benefit to that party, to the extent to which he or his estate has benefited therefrom.

21. In the case of ***Khan Gul vs. Lakha Singh***, AIR 1928 Lahore 609 (Full Bench), Full Bench comprising of 5 learned Judges have extensively dealt with this aspect. In that case, the plaintiffs purchased half a square from the defendant for a sum of Rs. 17,500/-. As the defendant refused to deliver possession of the property, the plaintiffs sued for delivery of possession of the property, or in the alternative, for a decree for recovery of the consideration amount together with interest or damages arising from breach of contract. The defendant pleaded minority. The Court found that the defendant made a false representation that he was of full age. On those facts the following two questions were referred to the Full Bench:

- (1) Whether a minor, who by falsely representing himself to be a major, has induced a person to enter into contract, is estopped from pleading his minority to avoid the contract.
- (2) Whether a party, who, when a minor has entered into a contract by means of a false representation as to his age, can, whether he be defendant or plaintiff, in a subsequent litigation, refuse to perform the contract and at the same time retain the benefit he may have derived

therefrom.

22. On the first question, the Full Bench gave the answer in the negative. On the second question, the Full Bench is also equally clear that, when a contract has been induced by false representation made by an infant as to his age he is liable neither on the contract nor in tort "if tort is directly connected with the contract and is the means of effecting it and parcel of the same transaction. But they relied upon the equitable jurisdiction of the Court to order restitution.

23. In so far as the second question is concerned, Sir Shadi Lal, Chief Justice observed thus,

“ But a false representation by an infant that he was of full age gives rise to an equitable liability. The Court, while relieving him from the consequences of the contract may in the exercise of its equitable jurisdiction restore the parties to the position which they occupied before the date of the contract. If the infant is in possession of any property which he has obtained by fraud, he can be compelled to restore it to his former owner. The matter is, however, debatable: if the benefit acquired by him consists of money which is not earmarked, has the Court of equity authority to make him liable for the payment, to the defrauded person, of a sum equal to the amount of which the latter has been deprived by the former? The equitable jurisdiction is founded upon the desire of the Court to do justice to both the parties by restoring them to the status quo ante, and there is no real difference between restoring the property and refunding the money except that the property can be identified but cash cannot be traced.

The doctrine of restitution finds expression in S. 41, *Specific Relief Act*. Suppose, A, an infant, executes an instrument of mortgage in favour of B for Rs. 1,000 borrowed by B by making a false representation as to his age. This instrument is void, and S 39, which expressly applies, not only to a voidable but also to a void, instrument, allows A to move the Court to adjudge it to be void and order it to be delivered up and cancelled. Then comes S.41, by which it is provided that on adjudging the cancellation of the instrument the Court may require A, to whom such relief is granted, to make any compensation to B which justice may require. It is beyond

question that under this section the Court has the discretion to impose terms upon A and to compel him to pay Rs. 1,000 as compensation to B. The statute nowhere says that pecuniary compensation should not be allowed, when the award thereof would be tantamount to a repayment of the money borrowed on the strength of a void transaction. Indeed, the Courts in India have ordered the minor to refund the money received by him before allowing him to recover the property sold or mortgaged to the other party.

... The equitable jurisdiction of the Court to other restitution rests purely upon the principle of justice, and that principle is no more applicable to a case in which he is a defendant. But when we come to the case law, we find it in an unsatisfactory state. The decisions of the High Courts in India show that when the minor succeeds in an action brought by him, he is ordinarily required to restore the benefit obtained by him by committing fraud. The same unanimity is not, however, found in cases in which he occupies the role of a defendant. In some cases of this character restitution has been allowed, e.g. *Saral Chand Mitter v. Mohun Bibi* [(1898) 25 Cal. 371], but there are several cases in which relief has not been granted against frauds committed by minors when they were defendants. The language of Ss. 39 and 41, *Specific Relief Act*, no doubt shows that the jurisdiction conferred thereby is to be exercised when the minor himself invokes the aid of the Court. The doctrine of restitution is not, however, confined to the cases covered by that section. That doctrine rests upon the salutary principle that an infant cannot be allowed by a Court of equity to take advantage of his own fraud. It is possible that, though the Court ordinarily imposes terms upon an infant guilty of fraud if he seeks its aid as a plaintiff it may decline to exercise its equitable jurisdiction if he happens to be a defendant. All that can reasonably be said is that the Court, in deciding whether relief against fraud practised by an infant should or should not be granted, will consider, along with other circumstances of the case, the fact that the infant is a defendant and not a plaintiff in the case. But there is no warrant either in principle or in equity for the general rule that the relief shall never be granted in a case where the infant happens to be a defendant.”

24. Harrison, J., however, referring to Section 41 of the Specific Relief Act, 1877, gave dissenting opinion. Tek Chand, J. divided the second question into two parts:

“The next question to be decided resolves itself into two parts-

(a) whether the quondam minor can avoid the contract and at the same time retain the benefit derived by him therefrom, and

(b) whether the matter is in any way affected by the circumstances that he is a plaintiff or a defendant in the action in which the question arises.”

25. The learned Judge observed thus,

“On both these points again, there is considerable conflict of judicial opinion, though speaking for myself, I do not feel the same difficulty here, as I do on the first question. It has been argued for the appellant that the contract being void and the Court being incompetent to enforce it or to grant relief in an action *ex delicto* arising from the deceit practised by the minor, it follows as a matter of course that it has no jurisdiction to order restitution or repayment of the consideration for this would be doing the same thing in another garb. In my opinion this argument is fallacious and ought to be rejected. In ordering restitution the Court is not enforcing a void contract but is restoring the parties to the status quo ante. The necessary consequence of the declaration that contract is void is to wipe it off entirely out of consideration, to it as if it had any existence, and the Court while granting the minor this relief is not powerless to adjust the equities between the parties and can make the fraudulent minor restore what he has obtained by the very contract which he is now seeking successfully to avoid. This is in accord with equity, justice and good conscience and appears to have been recognised for a long time by the Courts in England. It is no doubt true that there are dicta in several English decisions that this jurisdiction to make restitution in integrum is limited to those cases only in which it is possible to compel the minor to restore the property in specie which he had obtained by fraud, and that the Courts, while holding a contract to be void, cannot order him to refund the money which he has received under it. It is not, however, necessary to discuss the decisions, which bear on the point and which it is not always easy to reconcile as in India jurisdiction of Courts, to require a party at whose instance an instrument has been adjudged to be void to make any compensation to the other party which justice may require, has been expressly recognised by the Legislature in sections 39 and 11 of the Specific Relief Act. It will be noticed that this power to grant compensation is not confined to those cases only in which the instrument related to transfer of property, nor is the mode in which compensation is to be given

defined. The discretion of the Courts in the matter seems to be absolutely unfettered. They might, therefore, in appropriate cases, while adjudging a deed executed by a minor to be void, order refunds of the monetary consideration received by him under the contract, and in addition make him restore any other benefit which he has derived therefrom.”

26. The decision of **Khan Gul** (*supra*) was considered by the Full Bench of Allahabad High Court in **Ajudhia Prasad Vs. Chandan Lal (FB)**, AIR 1937 Allahabad 610. In that case, the defendants executed a mortgage deed dated 15-10-1925 in favour of the plaintiffs. When a suit was filed to enforce the mortgage, the defendants pleaded that they were minors at the time of the mortgage deed. It was found that there was fraudulent concealment of the fact that they were minors at the time of the execution of the mortgage deed.

27. The learned Judge rejected the plea based upon S. 65, Contract Act on the ground that that section could be invoiced only when the contract was between competent parties. They rejected the plea of estoppel on the ground that, when the contract itself was void, the plea of estoppel must fail. When rules of equity were invoked and when the decision of the Full Bench of the Lahore High Court was pressed upon them in support of the contention that there could not be any difference on principle between the recovery of the property sold or the money advanced to a minor, Sulaiman, C.J. observed at page 876 as follows :

"Where a contract of transfer of property is void, and such property can be traced, the property properly belongs to the promisor and can be followed. There is every equity in his favour for restoring the property to him. But where the property is not traceable, and the only way to grant compensation would be by granting a money decree against the minor, decreeing the claim would be almost tantamount to enforcing the minor's pecuniary liability under the contract which is void. The distinction is too obvious to be ignored".

28. When it was argued, relying upon the same decision, that there

could not be any distinction for the application of the equitable doctrine, whether the minor was a plaintiff or a defendant, the Chief Justice remarked at page 877 thus :

"Apparently the entire basis of the judgment is that as there is authority for imposing conditions on a minor to refund the consideration when he is suing as plaintiff for the rescission or cancellation of his void contract, there is an equal justification for passing a decree for money against him when he is being sued by his creditor, though he is a defendant.

...With utmost respect, I would say that such a view would be contrary to the great preponderance of authority both in England and in India and would ignore the well-recognised distinction between the position of a minor when suing as a plaintiff and when he is being sued as a defendant".

29. The Chief Justice also approved the view expressed by Harrison, J. in his dissenting judgment, and stated at pp. 617-618:

"The learned Judge rightly pointed out that S. 41, Specific Relief Act had no application because in a suit against an infant there is no question of the cancellation of an instrument and when the minor is a plaintiff, there is a well known principle that he who seeks equity must do equity, and therefore held that no suit of this nature being in its essence contractual, can lead to an order for restitution by the infant on the ground of his having dishonestly induced the plaintiff to contract with him and to pay him money.

The view of the learned dissenting Judge is in, accordance with the opinions expressed in numerous cases. To pass a decree against a minor enforcing his pecuniary liability would, while holding that the contract is void and unenforceable, at the same time by passing a decree against him, on the footing that he had entered into the contract and has not carried out its terms. There is no rule of equity, justice and good conscience which entitles a Court to enforce a void contract of a minor against him under the cloak of equitable doctrine".

30. In the result, the Full Bench held that no decree could be given to the plaintiff for recovery of the money against the defendant.

31. In the 13th Report, on the Contract Act, the Law Commission observed thus,

“37. Pollock and Mulla have expressed the view that judgment of Shadi Lal, C.J., in the Lahore case is correct and we share this view. Indeed, we have already expressed our preference in favour of the judgment of Shadi Lal C.J., in our report on the Specific Relief Act. We agree with the proposition that in ordering compensation, the Court is not giving effect to a contract but is doing its best to put the parties, so far as possible, in the position which they occupied before the void transaction took place and from which one of them was induced to depart by reason of the minor's fraud. This view appears to be more in consonance with the principles of equity and justice. It appears to us incongruous that while sections 38 and 41 of the Specific Relief Act apply to cases of minors, the principles underlying those sections should not be applicable to cases under the Contract Act. We feel that the Judicial Committee had not correctly interpreted section 65 and we are of the opinion that an agreement is 'void' or 'is discovered to be void' even though the invalidity arises by reason of the incompetency of a party to a contract. We recommend that an Explanation be added to section 65 to indicate that section should be applicable where a minor enters into an agreement on the false representation that he is a major.”

32. In the 9th Report, on the Specific Relief Act, 1877, the Law Commission observed thus,

“90. Though section 65 of the Contract Act applies in terms to void contracts, the Privy Council has held that that section has no application to contracts entered into by parties who were not competent to enter into any contract, and this View has been followed by the High Courts.

As to section 41 of the Specific Relief Act, the consensus of opinion is that it applies Where the minor is the plaintiff and seeks to set aside a transaction on the ground of his minority or asks for other relief on the footing that the transaction is a nullity’.

But as regards the application of section 41 as against a minor defendant, there is a sharp difference of opinion between the Lahore High Court on the one hand and the Allahabad and Andhra High Courts on the other. According to the Lahore High Court, the equitable principle underlying the section should be equally applicable to the plaintiff and the

defendant, and that, accordingly, when a minor enters into a contract on a false representation as to his age, and in a suit on the contract refuses to perform it on the ground of his minority, he must restore the proprietary or pecuniary benefit derived by him from the contract, whether he is the plaintiff or the defendant in the suit.

In other words, according to the Lahore High Court, the minor defendant should be bound not only to restore the property, if any, but also the monetary consideration obtained under the contract.

Sulaiman, C. J ., in the Allahabad case', was prepared to accept this principle so far as restoration of specific property was concerned, but not to the extent of repayment of the pecuniary benefit, for that, according to him, "would be tantamount to enforcing the minor's pecuniary liability under the contract which is void." This view has been followed by the Andhra High Court".

Having considered the rival points of view we are inclined to prefer the View of Shadi Lal, C. J., in the We have already recommended the acceptance of the doctrine of unjust enrichment. According to that doctrine, the obligation to restore an unjust benefit should not depend upon the mere accident of a person coming before the Court as a plaintiff or defendant. We also agree with the View that restoration of status quo ante would not amount to the enforcement of the void contract against the defendant. The principle applicable to a minor will also apply to the case of a person of unsound mind.

We recommend, therefore, that a sub-section should be included in the new provision suggested by us' to the effect that when a defendant successfully resists a suit on the ground that the contract is void, owing to his incapacity at the time of the contract, he must restore any benefit, whether proprietary or monetary, which he has actually received under the contract. But no question of liability to make any compensation, would arise in such a case."

33. In the light of the aforesaid discussion, even if I accept that **Rameshchandra** being a person of unsound mind was incapable of entering into agreement with the respondents and, therefore, agreement of leave and licence is void, nonetheless, he has to restore the benefit which he has received under that agreement by handing over possession

of the suit premises to the respondents. He cannot be heard to contend that though the agreement is void, he will retain the possession and will not handover the possession. This is not a case of enforcement of agreement but a case of restoration of benefit derived under the agreement.

34. Ms Helekar submitted that respondents are not the owners of the suit premises and that the developer who carried out development did not sell the suit premises to the respondents. In view of the registered leave and licence agreement as also explanation (b) to Section 24 of the Act, I do not find any merit in this submission.

35. Ms Helekar relied upon the decision of this Court in the case of **Somnath Dnyanoba Mahapure** (*supra*) to contend that the Authorities below did not hold the inquiry contemplated by Order XXXII, Rule 15 of the Code of Civil Procedure, 1908. She also relied upon the decision in the case of **Vijesh** (*supra*) to contend that no opportunity was granted while deciding the application for leave to defend. I do not find any merit in this submission. In fact, as noted earlier, the Competent Authority gave ample opportunity to **Kedar** to summon the Doctor who had issued the certificate. **Kedar** did not avail the opportunity. Even otherwise, I have proceeded on the premise that **Rameshchandra** is a person of unsound mind and agreement of leave and licence is void. Notwithstanding the said fact, he cannot retain the possession and he has to restore the benefit which is derived under the void agreement. In view thereof, the decisions relied by Ms Helekar do not advance the case of the petitioner.

36. In the light of the aforesaid discussion, I do not find any merit in this Petition. Petition fails and the same is dismissed.

37. Ms Helekar, on instructions of Kedar, who is present in person, states that during the course of the day, petitioner will deposit Demand Draft of Rs.5,00,000/- in this Court and balance amount of Rs.4,00,000/- within four weeks from today. Statements made, on instructions, are accepted in the form of undertaking to this Court.

38. At this stage, Ms Helekar orally applies for stay of this order for a period of 8 weeks from today. She assures that within 4 weeks from today, petitioner and all adult family members residing in the suit premises will furnish undertaking with advance copy to the other side incorporating therein that,

- (a) they are in possession and nobody else is in possession of the suit premises;
- (b) they have neither created third party interests nor parted with possession of the suit premises;
- (c) they will hereafter neither create third party interests nor part with possession of the suit premises;
- (d) in case they are unable to obtain suitable orders from the higher Court within eight weeks from today, they will hand over vacant and peaceful possession of the suit premises to the respondents;

39. In view thereof, notwithstanding dismissal of the Petition, subject to the petitioner filing the undertaking in the aforesaid terms within four weeks from today, this order shall remain stayed for the period of eight weeks from today with express understanding that no further application for extension shall be made and entertained by this Court. It is expressly made clear that if the petitioner does not deposit Rs.4,00,000/- within 4 weeks from today in this Court under intimation in writing to the Advocate for respondents, interim relief shall stand vacated without

further reference to the Court. Respondents are permitted to withdraw the amount of Rs.5,00,000/- to be deposited today and Rs.4,00,000/- to be deposited within 4 weeks from today.

40. Liberty is reserved to the petitioner to challenge the Sale Deed dated 03.04.2010. It is made clear that all contentions of the respondents in such proceedings are kept open. Order accordingly.

41. List the Petition for reporting compliance on 12.07.2018.

(R. G. KETKAR, J.)

Minal Parab